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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

WILLIAM E. DUNCAN,

Plaintiff,

v.

JOSEPH LEHMAN,

Defendant.

Case No. C04-5633RBL

REPORT AND  
RECOMMENDATION

**NOTED FOR:  
JULY 8<sup>th</sup>, 2005**

This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. Before the court is defendant's motion to dismiss for failure to state a claim. The defendants argue this action is barred by the doctrine of favorable termination. (Dkt. # 15). Plaintiff's counsel had responded, (Dkt. # 18). Defendant's counsel had replied. (Dkt.# 20).

The doctrine of favorable termination would result in dismissal without prejudice, the court

1 disagrees that the concept is applicable to the facts of this case. Accordingly the undersigned  
2 recommends that this motion to dismiss be **DENIED**.

## FACTS

4 Plaintiff was an inmate. Plaintiff alleges he was not released by the Department of  
5 Corrections on his earned early release date. When he was released from prison, he was held for civil  
6 commitment proceedings by parties who are not named defendants in this action.

## **DISCUSSION**

8 A court may dismiss a claim under Fed.R.Civ.P. 12(b)(6) if it appears beyond doubt that the  
9 plaintiff can prove no set of facts to support the claim that would entitle the plaintiff to relief.

10     Keniston v. Roberts, 717 F.2d 1295, 1300 (9th Cir. 1983), citing; Conley v. Gibson, 355 U.S. 41,  
11     45-56 (1957). Dismissal for failure to state a claim may be based on either the lack of a cognizable  
12     legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v.  
13     Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as  
14     admitted and the complaint is construed in the plaintiff's favor. Keniston v. Roberts, 717 F.2d 1295  
15     (9th Cir. 1983). However, a plaintiff must plead factual allegations with specificity; vague and  
16     conclusory allegations fail to state a claim for relief. Colburn v. Upper Darby Township, 838 F.2d  
17     663, 666 (3rd Cir. 1988).

18 Defendants argue this case should be dismissed without prejudice under the doctrine of  
19 favorable termination. (Dkt. # 15). Heck v. Humphrey, 512 U.S. 477 (1994). Defendant's reliance  
20 on Heck v. Humphrey is misplaced. The holding of Heck precludes a plaintiff from challenging a  
21 current conviction or confinement in a civil rights action, as the proper forum for an action that calls  
22 into question the propriety of current confinement is a habeas corpus action. The ruling in Heck  
23 follows a long line of Supreme Court cases which analyze when a civil rights action should be  
24 dismissed because it encroaches on habeas remedies. Heck v. Humphrey, 512 U.S. 477 (1994);  
25 citing Preiser v. Rodriguez, 411 U.S. 475 (1973).

26 The flaw in defendants argument is that the time for plaintiff filing a habeas action that  
27 challenges his release date on a prior conviction has elapsed. As of release plaintiff was not in

1 custody. A habeas filing challenging his prior conviction would be inappropriate. Under 28 U.S.C. §  
2 2254, the district court may entertain an application for a writ of habeas corpus only from a person in  
3 custody pursuant to the judgment of a state court. The custody requirement of the habeas corpus  
4 statute is designed to preserve the writ as a remedy for severe restraints on individual liberty.  
5 Hensley v. Municipal Court, San Jose Milpitas Judicial District, 411 U.S. 345, 351 (1973). The  
6 person must be in custody pursuant to the conviction or sentence under attack at the time the  
7 petition is filed. Maleng v. Cook, 490 U.S. 488, 490-91 (1989); Carafas v. LaVallee, 391 U.S. 234,  
8 238 (1968).

This action should not be dismissed based on the doctrine of favorable termination.

10 || Accordingly, this motion to dismiss should be **DENIED**.

## CONCLUSION

12 For the reasons outlined above the undersigned recommends **DENIAL** of defendant's motion  
13 to dismiss. A proposed order accompanies this Report and Recommendation.

14 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the  
15 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R.  
16 Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal.  
17 Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is  
18 directed to set the matter for consideration on **July 8<sup>th</sup>, 2005**, as noted in the caption.

DATED this 10<sup>th</sup> day of June, 2005.

/S/ J. Kelley Arnold  
J. Kelly Arnold  
United States Magistrate Judge